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No. 84-1351

In the Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE W. AKOOTCHOOK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

1. Whether the bare existence of aboriginal use and occupancy rights in certain Alaskan land exempted it from withdrawal by the Executive for reservation as National Wildlife Refuges.

2. Whether land that was properly withdrawn and reserved as National Wildlife Refuges was thereafter unavailable for allotment under the former Alaska Native Allotment Act, 43 U.S.C. (1970 ed.) 270-1 *et seq.* (repealed 1971).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 747 F.2d 1316. The opinion of the district court (Pet. App. 17a-24a) is unreported. The various administrative decisions (Pet. App. 26a-39a) are reported at 17 I.B.L.A. 189, 23 I.B.L.A. 304 (1976), and 43 I.B.L.A. 69.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1984. The petition for a writ of certiorari was filed on February 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The former Alaska Native Allotment Act (43 U.S.C. (1970 ed.) 270-1 *et seq.*) provided in relevant part:

> Section 1 — The Secretary of the Interior is authorized and empowered, in his discretion and under such rules

> as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved non-mineral land in Alaska * * * to any Indian, Aleut or Eskimo * * *.
>
> * * * * *
>
> Section 3 — No allotment shall be made to any person under sections 270-1 to 270-3 of this title until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

Former Section 1 of the Pickett Act, ch. 421, 36 Stat. 847, provided in relevant part:

> That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

STATEMENT

1. In 1906, Congress passed the Alaska Native Allotment Act (Allotment Act), ch. 2469, 34 Stat. 197, 43 U.S.C. (1970 ed.) 270-1, which gave Alaska Natives the right to apply for allotments, *i.e.* individual ownership, of nonmineral land based upon personal use and occupancy. In 1956, Section 1 of the Allotment Act was amended to limit the lands available for allotment explicitly to those that are "vacant, unappropriated and unreserved." Act of Aug. 2, 1956, ch. 891, § 1, 70 Stat. 954.[1] In 1971, the Allotment Act was repealed

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[1]Prior to 1956, the consistent administrative interpretation of the Allotment Act had been that allotments could be granted only on vacant, unappropriated and unreserved nonmineral land. Congress was

by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. *et seq.*, but ANCSA contained a savings clause for allotment applications pending on the date of repeal. 43 U.S.C. 1617(a).

2. Petitioners are Alaska Natives who applied for allotments to land that is — and was at the time of the applications — part of three National Wildlife Refuges — Arctic, Yukon Delta, or Kodiak Island.[2] The Department of the Interior rejected the allotment applications because the lands sought by petitioners were part of a National Wildlife Refuge and therefore were not "vacant, unappropriated, and unreserved" as required by the Allotment Act. The three National Wildlife Refuges involved in this case had been withdrawn and reserved prior to petitioners' individual use of the land by a series of Executive Orders dating back to 1919. See Pet. App. 3a. The orders withdrew the lands "from all forms of appropriation under the public land laws." See, *e.g.*, Public Land Order (PLO) 1634 (Kodiak Island) (E.R. 348).[3] In 1980, the Alaska National Interest Lands Conservation Act (ANILCA) consolidated these withdrawals into the three National Wildlife Refuges. Pub. L. No. 96-487, § 303(2), (5) and (7), 94 Stat. 2390-2393; see 16 U.S.C. 668dd note.

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aware of, and explicitly adopted, this administrative policy. See S. Rep. 2696, 84th Cong., 2d Sess. 4 (1956).

[2]Petitioners were granted class action status to represent all Alaska Natives who had applied for allotments of land located within one of the three refuges and whose applications had been or would be denied because the land they wanted had been withdrawn and reserved as a National Wildlife Refuge.

Most of petitioners' applications were timely under the savings clause of ANCSA. Apparently, one of the petitioners, Stanley McCormick, did not file his application for an allotment until March 31, 1972 (Pet. 3), which is beyond the December 18, 1971, cut-off date established by ANCSA. See 43 U.S.C. 1617(a).

[3]"E.R." refers to the excerpt of record filed in the court of appeals.

3. After the administrative denial, petitioners brought this suit in the United States District Court for the District of Alaska to compel the Department of the Interior to consider their applications. They contended that the lands had not validly been withdrawn and that in any event use of the lands by ancestors prior to withdrawal made the land still available for allotment. The district court rejected these arguments and granted summary judgment for the government (Pet. App. 17a-24a).

The court of appeals affirmed (Pet. App. 2a-16a). The court, in an opinion by Judge Beezer, explained that the withdrawals by the Executive were authorized by the Pickett Act, ch. 421, 36 Stat. 847, because the lands in question were "public lands" within the meaning of that statute (Pet. App. 6a). The court noted that it thought it appropriate for Congress to review the fairness of this result (*id.* at 9a). Judge Ferguson wrote a separate concurring opinion agreeing that the result was compelled by existing law, but stressing that he believed that it would be appropriate for Congress to grant relief to the plaintiffs (*id.* at 10a-15a).

ARGUMENT

Petitioners contend that the court of appeals erred in upholding the Department of the Interior's refusal to grant allotments on lands previously withdrawn by the Executive and established as National Wildlife Refuges. The decision of the court of appeals is correct. Indeed, it was joined by all the judges on the panel even though each judge expressed concern about the fairness of the result and urged that Congress consider the question anew. Moreover, the decision below does not conflict with any decision of another court of appeals; nor can such a conflict arise in the future, since only the Ninth Circuit has jurisdiction over Alaska Native claims under the Allotment Act. Accordingly, review by this Court is unwarranted.

At the outset, it is important to emphasize that the question presented here is a narrow one — whether Alaska Natives may obtain allotments of land that, prior to their individual use and occupancy, had been withdrawn and reserved as part of a National Wildlife Refuge. This case does not concern Alaska Natives' ability to use refuge land for subsistence needs. In ANILCA, Congress specifically authorized continued subsistence use by local residents of land within the three refuges at issue here. Section 303(2)(B)(iii), (5)(B)(iii), and (7)(B)(iii); 94 Stat. 2390-2393.[4] Moreover, this case does not involve Alaska Natives' ability to obtain allotments on land used as a primary place of residence, which is permitted by statute (43 U.S.C. 1613(h)(5)) if application was made before December 18, 1973. Finally, this case does not involve use and occupancy rights (aboriginal title), which were expressly extinguished by Congress in ANCSA, 43 U.S.C. 1603(b).

1. Petitioners contend that the existence of Alaska Natives' aboriginal title (pre-ANCSA) in the lands in question caused them to fall outside the term "public lands," as it was used in Pickett Act, because the aboriginal title exempted the lands from sale or disposal under public land laws. The courts below correctly rejected this far-reaching contention.[5] The Pickett Act itself did not define the term

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[4]Permitted subsistence uses under ANILCA include "customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade." 16 U.S.C. 3113.

[5]Alaska Natives have claimed aboriginal title to 250 million of the 272 million acres of land in Alaska. See *Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1364 (D. D.C. 1973). Thus, if petitioners were correct, almost all of the land in Alaska would have been immune from withdrawal and reservation by the Executive.

"public lands." This Court, however, has held that the phrase must be read in context and twice has determined that the term "public lands" can refer to Indian-occupied lands. *Larkin* v. *Paugh*, 276 U.S. 431, 438 (1928); *Kindred* v. *Union P. R.R.*, 225 U.S. 582, 596 (1912). Thus, petitioners' broad assertion that "public lands" can never include lands upon which Indians have use or occupancy rights is clearly mistaken.

As the district court explained (Pet. App. 20a-21a), the structure of the Pickett Act indicates that it covered lands used and occupied by Alaska Natives. Section 2 of the Pickett Act, 36 Stat. 848, excepted from withdrawal:

> all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law: but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made * * *. [6]

This express exception in Section 2 could be necessary only if Section 1 otherwise applied even to lawful homesteads and to entries and settlements made in anticipation of perfecting homesteads. If the homesteads described in Section 2 were "public lands," so were the lands

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[6]Simple use and occupancy, unlike occupancy in anticipation of perfecting a homestead, is insufficient under Section 2 to except land from withdrawal under the Pickett Act. Therefore, because petitioner's Native predecessors never proceeded to obtain allotments on the land, their mere use and occupancy did not except the land from withdrawal and reservation under the Pickett Act.

used and occupied by Alaska Natives, and therefore the lands in question were subject to withdrawal under the Pickett Act.[7]

In addition, as the district court found (Pet. App. 21a), the Department of the Interior's consistent interpretation — dating back to 1935 — of the term "public lands" in the Pickett Act, which is entitled to considerable deference (*Kindred* v. *Union P. R.R.*, 225 U.S. at 596), has been that a withdrawal was effective where use and occupancy rights had attached under a homestead entry, but the entryman thereafter had failed to maintain and perfect the homestead.[8]

That interpretation, moreover, accords with the general distinction that numerous cases have drawn between use and occupancy rights, on the one hand, and the existence of permanent rights in the land — enforceable against the United States — on the other hand. In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), the Alaska Native plaintiffs also argued that their use and occupancy of the land conferred a protected status upon it and created a compensable property right against the United States. This Court disagreed, explaining (*id.* at 278 (emphasis in original)):

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[7]The legislative history quoted (incompletely) by petitioners (Pet. 6) is not to the contrary. The full quotation in the Senate Report is that "public lands" describes "such lands as are subject to sale or other disposition under general law and not to lands that have been reserved by treaty, act of Congress, or executive proclamation." S. Rep. 171, 61st Cong., 2d Sess. 3 (1910). Thus, the legislative history simply draws a distinction between generally unrestricted lands and those that have been explicitly restricted by the government; it does not address at all the question of aboriginal use and occupancy rights.

[8]Alaska Natives who personally used and occupied the land prior to withdrawal were nevertheless permitted under the Allotment Act to apply for allotment after the withdrawal occurred. Petitioners, however, did not personally use the lands in question prior to withdrawal.

> We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken.

The Court went on to state that, in order to demonstrate the existence of rights above and beyond the right of occupancy, "there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." 348 U.S. at 278-279. See also *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 338 (1945); *Nadeau* v. *Union P. R.R.*, 253 U.S. 442, 445-446 (1920).[9]

2. Petitioners also contend (Pet. 7-11) that, even if the Executive withdrawals and reservations were authorized by the Pickett Act, express congressional action was necessary to defeat their right to apply for an allotment. But petitioners here confuse two distinct concepts — use and occupancy rights and ownership interests. The Alaska Natives' right to an allotment — an ownership interest — was based solely on the Allotment Act, which limited the right to "vacant, unapportioned, and unreserved" land. The Executive withdrawals therefore end this right with respect to such

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[9]In any event, the government has maintained throughout this litigation that the lands in question were withdrawn and reserved pursuant to the President's implied authority. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915); PLOs 2213, 1634, and 82 (E.R. 341, 348, 350). (The President's power to make such implied withdrawals was revoked by Congress in the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792, which repealed the Pickett Act.) Therefore, the withdrawals here were valid even if petitioners' construction of the Pickett Act is correct.

reserved lands. Petitioners are correct in asserting (Pet. 10) that congressional action was necessary to eliminate their use and occupancy rights, or aboriginal title. But it has never been suggested that the use and occupancy rights on the land were abrogated until Congress explicitly did so in ANCSA, 43 U.S.C. 1603(b).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1985

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[10]Petitioners also object (Pet. 11-13) that the result here unfairly treats Alaska Natives whose ancestors had used this land for generations. As the judges on the court of appeals recognized (Pet. App. 9a, 10a, 15a), however, that objection is one that must be addressed to Congress. The agency here acted correctly in adhering to the requirements of existing law.

DOJ-1985-04